

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:10cv119**

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|------------------------------------|---|-----------------------|
| PENNY DUNSTON, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| Vs. |) | MEMORANDUM AND |
| |) | RECOMMENDATION |
| BANK OF AMERICA, N.A.; and |) | |
| NATIONWIDE TRUSTEE SERVICE, |) | |
| INC., |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

THIS MATTER is before the court upon Bank of America, N.A.'s Motion to Dismiss. Plaintiff is represented by counsel, but has failed to file a Response to such motion and has further failed to comply with the instructions of this court.

On June 11, 2010, this action was removed from the North Carolina General Court of Justice, Superior Court Division, Rutherford County, by defendant Bank of America based on the presence of a federal question. On June 14, 2010, the Clerk of this Court notified counsel for plaintiff (who is a member of the North Carolina State Bar) that he was required to register for ECF and set a deadline of June 24, 2010, to so register. On June 17, 2010, defendant Bank of America, N.A., filed the instant motion, to which a response was required to be filed not later than July 6, 2010. On

July 1, 2010, a second notice was sent by the Clerk of this Court informing counsel for plaintiff of his non-compliance with ECF.¹ As of July 7, 2010, neither a response or any correspondence had been filed with this court by counsel for plaintiff.

The undersigned is, therefore, compelled to recommend that this action be dismissed with prejudice in its entirety as plaintiff has failed to respond to the Motion to Dismiss within the time provided by Local Civil Rule 7.1(E). Further, such motion being unopposed, it appears that defendant Bank of America, N.A., has made an unrebutted showing supported by references to current law that 15 U.S.C. § 1639 and 12 C.F.R. § 226.32 have no application to plaintiff's loan, that plaintiff has not alleged sufficient facts to state a claim under TILA, 15 U.S.C. § 1638, that her TILA claim is otherwise barred by the one year statute of limitations, and that because she has no claim under TILA, she also lacks an equitable ground under which to enjoin the foreclosure sale under Chapter 45-21.34 of the North Carolina General Statutes.

Having carefully considered Bank of America, N.A.'s Motion to Dismiss and reviewed the pleadings, the court enters the following Recommendation.

¹ A second notice was also sent to James Tarlton, counsel for defendant Nationwide Trustee Service, Inc.

RECOMMENDATION

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED that Bank of America, N.A.'s Motion to Dismiss (#4) be **ALLOWED**, and that this action be **DISMISSED** in its entirety with prejudice.

Time for Objections

The parties are hereby advised that, pursuant to 28, United States Code, Section 636(b)(1)(C), and Rule 72, Federal Rules of Civil Procedure, written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within **fourteen (14)** days of service of same. **Responses to the objections must be filed within fourteen (14) days of service of the objections.** Failure to file objections to this Memorandum and Recommendation with the district court will preclude the parties from raising such objections on appeal. Thomas v. Arn, 474 U.S. 140 (1985), reh'g denied, 474 U.S. 1111 (1986); United States v. Schronce, 727 F.2d 91 (4th Cir.), cert. denied, 467 U.S. 1208 (1984).

Signed: July 7, 2010

Dennis L. Howell

Dennis L. Howell
United States Magistrate Judge

